IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

NO. 75-6909

GARY MANESS,
Petitioner,

V.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Offender
Rehabilitation,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT

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INTRODUCTION

Pursuant to United States Supreme Court Rules 24 and 40(3), the respondent respectfully accepts those portions of petitioner's brief entitled "Opinion Below", "Jurisdiction", and "Constitutional Provisions Involved", as substantially true and correct.

STATEMENT OF THE CASE

A. The Proceedings In State Trial Court

Petitioner's argument is predicated on elevating alleged evidentiary error to constitutional magnitude by claiming that this alleged error rendered his entire trial fundamentally unfair. Petitioner's statement does not include a recitation of all pertinent testimony which was before the jury. Respondent, therefore, must provide a brief statement of the testimony, excluding therefrom tangential legal issues decided adversely to petitioner and not asserted in federal court.[1/]

1. The State's Case Against Petitioner, Excluding The Testimony Of Linda Maness And Gary Maness.

1/ Petitioner was convicted in 1971. As of June, 1976, he is living and undergoing parole supervision in St. Louis, Missouri.

Linda and Gary Maness were married in December of 1969. Linda stayed in Texas with her baby before joining Gary in Homestead, Florida on March 12, 1971. Immediately prior to Linda's arrival, Gary told a waitress in conversation that his marriage was a mistake. (A. 68-69, 135-136).

Madeline Keith met Gary once near the end of March, 1971, over at a friend's apartment in Homestead.[2/] Gary came into the friend's apartment. The friend asked to see the baby. Gary replied that she did not want to see the baby now "because it looks like it has been beaten <u>again</u>, but it really hasn't."[3/] The friend asked Gary

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2/ At the time of trial, Ms. Keith's friend, Mrs. McClain, was living in Ohio and was not an available witness. (A. 47, 80-82).

3/ This witness could not remember what Gary's exact words were. (A. 47).

what he meant. Gary replied that "it fell off our bed" and bruised the side of her face a few days ago, that the bruises were just becoming visible and that "we" were taking her to the hospital.

When Ms. Keith went to the car, she saw Linda and the baby, Misty, in the car. Gary was standing outside the car by the driver's side. Ms. Keith could tell that the baby was hurt. The baby was sitting in the car and "didn't look like it could move." "Its [the baby's] whole side of its face--its eye was all hurt and red and its nose was--I couldn't tell if it was broken or not, but it was pretty bad." Regarding the condition of the baby, Gary "was laughing about it and he says it looks like he's been beating it again." (A. 44-47, 49-50).

Gary borrowed Ms. Keith's car and subsequently returned two and one-half hours

later. Ms. Keith and her friend were taking Gary home. Only these three were in the car. The two women inquired as to what the doctor said. Gary told them that the doctor said that the baby was "okay", could be taken home, but should be brought back if the baby did not get better. Gary asked both women if they were married and said he could not understand being married, that married life was not for him, that he did not want the responsibility of married life and that he was planning a divorce as soon as possible. Gary further stated during this conversation that he "didn't really want the child, to care for it. . . ." (A. 47-48).

At least two or three weeks prior to April 14, 1971, a neighbor of the Maness family, who knew them only casually, heard the baby crying. This neighbor looked out

of her door and saw the baby throwing a temper tantrum in a car. Gary told this child to "shut up" and grabbed this baby by the left arm and jerked the infant to the back seat with a firm, hard jerk. (A. 57-58).

At approximately 6:00 p.m. on the evening of April 14, 1971, Linda and Gary brought the baby, Misty, into the emergency room at Homestead Air Force Base's hospital. The physician in charge saw the child immediately. The baby was completely comatose; i.e., was not responding to any stimulus whatsoever, and was limp with very labored respiration. The doctor observed multiple bruises about the face, one eye which was swollen closed, bruises around the shoulder and collarbone area, and some bruises on the lower extremities. He also observed that one arm appeared to be held at a grotesque angle. The doctor

suspected that the baby had a broken arm, a broken collarbone and a broken leg. The doctor also found a sign of a severe "inside-the-head" injury. During this diagnosis, the doctor asked what happened. Gary said that this baby "had a habit of beating itself against the side of the crib and also hitting itself with a bottle." The doctor talked to Gary because his wife appeared to be quite nervous and upset. Gary was acting "very nonchalant." (A. 34-37).

The doctor asked Gary to tell him the truth as to how this baby was injured and further stated that the baby did not sustain her injuries in the manner Gary described, that the baby was dying and that this doctor had to know how the injuries were sustained. Gary replied, "We didn't have anything to do with it." This doctor's

opinion was that the blows were not consistent with a fall in the crib, that the bruises were not consistent with striking one's self with a bottle and that it was "impossible" that a six or seven-month old child could beat itself with anything to sustain those injuries. Within a matter of moments this doctor contacted Jackson Memorial Hospital in Miami and arranged for emergency treatment. Linda was present when the doctor was questioning Gary but the doctor did not believe that Linda did any talking whatsoever. (A. 37-38).

An associate dean and professor of pediatrics at the University of Miami School of Medicine saw the baby, Misty, at Jackson Memorial Hospital at 11:35 p.m. on April 14, 1971. This infant was not responding to any type of stimulus and was comatose. Examination further revealed

multiple bruises covering the upper chest, shoulders and primarily the face and head. There were severe bruises around the outside of the eye. This baby's left arm was in a strange position and, even though there was very little spontaneous movement by the baby, it was obvious that this infant was not attempting to move that arm. (A. 39-40).

Tests eliminated the possibility that the infant had a bleeding disorder and led to the belief that the child's bruises must have been caused by some form of accident. The medical staff ruled out the possibility that the baby sustained this bleeding naturally or by accident and "it was the opinion of everyone who saw the child that it was a battered-child syndrome." This diagnosis was supported by discovery of a fracture of the baby's arm and a fracture of a leg, which latter fracture was "a healing frac-

ture which had been sustained, one, two or three weeks before." The pediatrician had seen about ten children who had been severely beaten but had "never seen a child beaten to this degree." (A. 40-43).

The pediatrician spoke to Linda and Gary and some time informed both parents that "protective custody" had been contacted. This pediatrician asked if these parents knew if the child had been in an accident or beaten up by somebody. Gary said that the child had been well until 4:00 p.m. o 5:00 p.m. when they noticed that the child was not responsive, not reacting normally, was breathing irregularly and might have been having convulsions. Linda stated "virtually the same thing." "They" said that the child was well until that afternoon when the mother left the house and was gone for a period of two, three or

four hours. [Note: This statement was made on the day of the crime, twelve days before Gary's confession and before any police statements were given by either Linda or Gary.] Both parents gave the same explanation as to the bruises on the face; i.e., that the child hit itself with the bottle or would bang itself against the crib or floor. The degree of injuries sustained by Misty was not consistent with this pediatrician's observations of other children who had fallen from high places, hit themselves with bottles, fallen against a crib or just tumbled over. This and the parents' denial of a car accident resulted in ruling out self-infliction or accident as the cause of the injuries. (A. 40-42).

The witness, a pediatrician and professor of medicine, explained the battered-child syndrome as child beating which could

take many forms, including loss of temper or control by some individual, which behavior would be repeated "most of the time." Common evidence of this phenomenon other than bruises is fractured bones. This pediatrician's investigation into past battered-child syndrome cases revealed past incidents of violence by the perpetrator "most of the time." Past acts of violence against the child would be consistent with the battered-child syndrome. (A. 42-44).

The medical examiner's office conducted a post-mortem autopsy of the baby, Misty, on April 19, 1971. This examination led to the following observations and conclusions. The body bore several marks of violence. There were bruises covering the entire left half of the face, which were more prominent on the cheek, tip of the nose

and forehead, and similar bruises on the right side. Bruises and infection were also observed on the outside and inside of the lips. Internal examination revealed a patchy area of bleeding inside the head behind the surface of the brain "as a result of the trauma to the left side of the face." There was a "spiral type" fracture of the left arm which was a fairly recent fracture approximately four days to two weeks old and which type of fracture is commonly seen in a twisting of the arm. In addition, there was a complete "healing" fracture of the right leg which was a minimum of three weeks and a maximum of six weeks old. The cause of death was "blunt injury to the head and its subsequent complications"--"a combination of total injury to the head." Two minor slaps would not produce the bruises which were

observed, but severe blows with a fist or opened hand would. At the time the leg fracture was sustained, the child would show symptoms of injury such as crying and limitations on crawling and the person who moved the child should be able to suspect injury. (A. 27-34).

Gary gave a statement to one police officer on April 18, 1971, after being advised of his constitutional rights. On April 25, 1971, another officer went to the Maness residence and separately took Linda and later Gary to another location for an interview, advising both of their constitutional rights. The following information was obtained. To Gary's knowledge Linda had not abused the child prior to coming to Homestead on March 12, 1971. They had not utilized the services of a baby-sitter for the infant since March 12th.

Gary's explanation for the baby's injuries was that Misty had a habit of beating her head with a baby bottle as she was holding the nipple and had a habit of beating its own head against the crib which once before caused her to sustain bruises. The bruise marks on Misty's chest came from sleeping on the bottle on her stomach. Gary denied ever beating or killing the child and said that, to his knowledge, Linda had never beaten Misty. This police officer informed Gary that the baby died from a subdural hemorrhage and had a broken arm and broken leg. Gary denied knowing how these injuries were sustained. The officer denied telling Gary to tell the truth to keep her from going to jail. (A. 65, 71-76).

At 2:20 p.m. on the next day, April 26, 1971, the officer who interrogated Gary on the night before returned to the Maness

residence and arrested Gary. Gary was taken to the police station. While this officer was engaged in paper work regarding the arrest, Gary, after sitting quietly for a while, asked this officer what the consequences would be if he gave a confession. Gary's initial query of the consequences was not in response to any question which the officer asked him. After a warning form was signed and following a call to his wife, a court reporter was brought in and a statement taken at 4:30 p.m. After a transcript of the statement was typed up one hour later, Gary checked it for accuracy, made one or two corrections, and signed it. Prior to the statement the officer did not tell Gary that he hated to see Linda go to jail and did not tell Gary that he could help Linda by saying that he did it and that she had nothing to do with it. (A. 59-63, 76-79, 164).

Gary's statement in pertinent part was as follows: Gary recanted his first police statement. Gary stated that on April 14, 1971, his wife went to the store for a few minutes. The baby was crying. Gary went to the bedroom to give Misty a bottle, rocked her and "I guess I just lost my cool, like you said, and I slapped her twice" with his opened hand using a forward stroke and a back stroke. Gary put the blanket over Misty and waited for Linda to return. One half hour after Linda returned, Linda went to feed Misty, discovered Misty's condition and called Gary in. (A. 63-67, 165-168).

Gary also stated that he smacked Misty in the jaw once before. Gary denied knowing how Misty broke her arm but admitted once having Misty by the arm and sliding her across the seat of the car. Once in the car Gary smacked Misty's leg two times.

Regarding the first two trips to the hospital to treat Misty's bruises, these bruises "happened like we said, she bumped her head on the bed." Since March 12th Gary never saw Linda physically abuse Misty in any way but did see Linda spank Misty on her rear without excessive force. Linda said something once about Gary's striking the child but Linda never physically restrained Gary. Gary would send Linda out of the baby's room because the baby would not go to sleep as long as she could see Linda and, during one or two of the four times Linda was sent out, Gary spanked Misty. Regarding his temper, Gary "hollers alot" but engaged in nothing physical. Gary would "holler" at the baby and tell her to be quiet or lay down. The baby would cry once in a while when Gary picked her up but this did not really bother Gary.

Gary concluded his statement by saying that, since the beginning of the investigation, no officer or other person mistreated him or threatened or coerced him at any time in order to make a statement, that he gave this statement knowing his constitutional rights and that this statement was given freely and voluntarily. (A. 67-71, 168-172).

2. The Defense's Case

   a. Linda Maness' testimony, excluding procedural facts pertaining to the attempted impeachment of Linda.

Linda denied killing or striking Misty in the face or head. When Linda awoke on the morning of April 14, 1971, Gary had already gone to work. Linda noticed a bruise on Misty's forehead for the first time that morning but did not know or tell anyone how this bruise was obtained. At this time,

Misty was fine and healthy, although she favored her left arm. Gary came home about one or two hours after Linda woke up. "We" went to pay the rent for the television, returned around noon, fed and put the baby to bed, and "we" sat and watched television until around 4:00 p.m. when Linda walked down to the corner store. When Linda returned, she went to feed Misty and found her in the same condition which Misty was in when taken to the hospital. Linda called a neighbor, who was a nurse and who suggested that Misty should be taken to the hospital. Gary said that they should wait for a while. (A. 84-88).

At the hospital Linda did not tell anyone how Misty was injured because she did not know. Linda first noticed bruises on Misty's head in March but did not know how Misty obtained them. "We" took Misty to

the hospital for treatment. Linda did not know how Misty hurt her arm but did notice that Misty was babying it. Linda did not know that the infant had hurt its leg until after Misty died. Linda found some bloody baby blankets prior to the day of the incident, which became bloody because Misty had a cracked gum. Linda denied seeing Gary do anything to Misty. Linda admitted lying to the police in her first statement when she said that Gary never slapped Misty anywhere but on her "butt". (A. 88-97, 99-100).

During cross-examination by the State, Linda testified that while on route to pay for the television on April 14th, Gary took the baby from Linda and, when the baby kept crying, Gary hit her twice on the face. Linda's trip to the store took ten to fifteen minutes and it was only after that

trip that Linda noticed other bruises on Misty's face. Linda had no problems with Misty before Linda came to Miami. One week prior to April 14th while the three were returning home from the hospital, Gary slapped Misty on the leg, because this infant was kicking her legs, and thereby caused a red mark to appear. When Linda tried to pick the baby up, Gary slapped Linda. Misty did not favor her leg after this. When Gary asked Linda to leave, he told Linda that he was not ready to be married and did not want to be tied down, that Linda would be better off at home, and that she should take Misty with her. Linda testified that prior to giving birth to Misty and while living in Texas, Gary picked up a "crying" puppy which Linda was playing with and threw it across the room into a box, hurting one of its legs. Linda

did not recall how many times Gary lost his temper but knew it was more than twice. (A. 97-99).

b. Gary Maness' testimony.

Gary denied killing Misty or striking her in the face "at any time." After returning from work on April 14th during which time Gary purchased a teargas gun, Gary noticed a bruise on Misty's forehead, did not know how it got there, and asked Linda, who said she did not know. Gary obtained ice and a washrag and applied it to Misty's head. After Linda and Gary returned from paying for the television, both were watching television until an argument arose about having another baby, which Gary wanted but Linda did not. Gary became mad and went outside and shot off the teargas gun until Linda came out and said she was going to have another baby. Both returned to the

house and watched television until Misty was discovered in her mortal condition. Gary washed the baby's face but Misty did not respond. Linda said she would get the girl to come down from upstairs. When this girl suggested seeing a doctor, Gary called a co-worker to take them, but he never came. While at Jackson hospital Gary went down to fill out papers, during which time the doctors talked to Linda alone. Linda told Gary that the doctors "said they wanted her to say I beat the baby." Though Gary did not know or see Misty do so, he did tell the doctors that Misty had a habit of hitting her head against the crib. Gary's knowledge of this was based on what Linda told him. (A. 100-103).

Gary's version of the incident with Mrs. McClain was that he said that Misty looked like she had been in a fight and

lost and "we all kind of laughed about it." On returning from the hospital at this time, Linda slapped Misty twice "pretty hard" on the right leg; Gary told her to stop; Linda refused saying it was her baby, and Gary slapped Linda. (A. 104-105).

Gary noticed that Misty couldn't hold her bottle for a while. When Gary asked Linda what was wrong, Linda said that she found Misty's arms stuck through the bars of the crib. (A. 105).

After both Linda and Gary returned from burying Misty in Tennessee, a police officer came to the house the next night and questioned both Linda and Gary. This officer accused Gary of killing the baby and said that Gary lost his cool and slapped Misty while Linda went on her trip to the store. Before Gary was dropped off, the

interrogating officer told Gary to remember "what he said about my wife if I wanted to help her out." Gary then asked Linda what she had told the officer. Linda said that she told them that she went to the store and left Gary alone with the baby. [Note that this story was also related to the pediatrician on April 14. The police interview in question occurred April 25.] Linda told Gary that she made this statement because Gary told her to do so. Gary told Linda to tell this story because the inspector, who talked to Linda and Gary, said that "one of us" would go to jail. Gary said that he would go because he did not want Linda and his baby to go to jail. Linda had informed Gary that she was pregnant while they were in Tennessee, and further made this assertion in letters which she wrote to Gary. (A. 106-108).

On the day Gary was arrested, the interrogating officer told him that the only way he could save Linda was by confessing and stating that Linda had nothing to do with the crime. It was at this time that Gary called Linda and told her what he was going to say "because she was to go to jail too." Gary then requested a lawyer but was toid that if he saw a lawyer, "we won't talk to you no more about your wife." Gary then made his statement, solely to protect his wife. (A. 108-109, 119-121).

During State cross- and re-cross examination, Gary claimed that Ms. Keith, Ms. Kelly, the waitress, the police officer and Linda were all lying or mistaken when they testified to anything which would tend to incriminate him. Regarding his confession, the officer told Gary that he knew Gary committed the crime but that "my wife

would probably go to jail too." "He didn't say that she was going to. He said she would probably go to jail too. There was a good chance." Gary admitted striking Misty at various times. Gary rehearsed his confession to himself and was ready to make a statement if he had to. The "self-infliction" story was told by Gary to various people because that was what was told to him and what was true "as far as I know." (A. 109-119, 121-122).

At no time during Gary's testimony did Gary directly state that Linda gave Misty the fatal beating on April 14th even though he testified that both were at the house and together subsequent to the trip to pay for the television. Moreover, Gary's alleged impetus to confess was never expressed by Gary as motivation to protect Linda from goingto jail while Gary remained free.

Rather, according to Gary, Gary would go to jail, but Linda would "too". (A. 100-122).

3. Other Relevant Facts

Pursuant to agreement with the State Attorney, Gary went to take a lie-detector examination with polygraph expert Warren Holmes at his request on June 29, 1971. (R. 418, 419, 420). Following return of the guilty verdict, Gary's attorney told the trial judge prior to sentencing, "He went to Warren Holmes. He did not pass the lie detector test, but he testified under oath anyway." (A. 162).

Following the conclusion of the defendant's motion to suppress, defense counsel informed the trial court that the State was the one who brought Linda Maness to Florida

from Texas and that Linda was "the defendant's chief witness, but whom I haven't subpoenaed." (A. 17).

During closing argument, the defense attorney never affirmatively and directly argued that Linda gave the fatal beating to Misty on April 14, 1971. (A. 145-152).

B. The Proceedings Subsequent To The State Trial.

The respondent accepts petitioner's statement regarding proceedings occurring after the State court trial as being substantially correct but will amplify same in the argument portion of this brief to avoid redundancy.

SUMMARY OF ARGUMENT

I

Petitioner flagrantly violated the

statutory command of 28 U.S.C. § 2254 by presenting the federal courts with an entirely different factual argument than he presented to the state courts under circumstances where the addition of these facts changed petitioner's entire claim. Under these circumstances petitioner may not have his claim heard in the federal courts. Because petitioner still has at least one available remedy in the Florida courts the lower courts were correct in denying relief.

II

The rationale of Chambers v. Mississippi, 410 U.S. 284 (1973) was never intended to encompass the factual circumstances presented by the instant case. Petitioner was not precluded from presenting various items of evidence but for Florida's statutory

voucher rule. Rather, the evidence which petitioner desired to introduce was inadmissible pursuant to numerous Florida evidentiary rules of law. This Court has never held that a defendant can ignore rules of evidence. The fact that the evidence, which petitioner was precluded from introducing, rendered his defense less persuasive that it might have been does not warrant a change in this Court's position. All rules of evidence render less persuasive the arguments which could have been made, when these rules are applied to preclude evidence.

Moreover, since petitioner never affirmatively stated that his wife committed the crime and since petitioner never presented independent evidence that his wife ever abused their baby, the evidence which was

kept from the jury could not raise an evidentiary error to the magnitude of rendering petitioner's entire trial fundamentally unfair.

Petitioner improperly seeks to distort judicial proceedings by using the Due Process Clause as a sword and not a shield. The Constitution cannot be abused in this manner.

ARGUMENT

POINT ONE

THE FEDERAL DISTRICT COURT PROPERLY DENIED FEDERAL HABEAS CORPUS RELIEF TO PETITIONER WHERE PETITIONER FAILED TO PRESENT THE SAME FACTUAL ARGUMENT TO THE STATE COURTS WHICH HE PRESENTED TO THE FEDERAL COURTS IN A SITUATION WHERE THE ADDITIONAL FACTS HAVE THE EFFECT OF CHANGING HIS ENTIRE CLAIM: WHERE PETITIONER HAS AN AVAILABLE STATE REMEDY TO ASSERT HIS PRESENT CLAIM AND WHERE, AS A CONSEQUENCE PETITIONER HAS FAILED TO EXHAUST HIS AVAILABLE STATE REMEDIES BEFORE SEEKING FEDERAL HABEAS CORPUS RELIEF.

During his state court trial, petitioner never asserted to the trial judge that the trial court's evidentiary rulings were such as to deny petitioner due process of law, when petitioner sought to examine Linda, Dana and Ruth Maness. (A. 84-162). The minutes of the state trial court clerk reflect that petitioner never filed a motion for a new trial and, therefore, never presented the issue sub judice to the state

trial court judge at all. (R. 414-415).

Following the filing of his notice of appeal to the District Court of Appeal of Florida, Third District and pursuant to the requirements of Florida appellate procedural law, Fla. App. Rule 3.5, petitioner filed assignments of error to give notice of the trial court errors which he would litigate on appeal. Assignments number eight (8) and nine (9) claimed trial court error in denying petitioner's motion to question Linda Maness as a hostile witness and in excluding the testimony of Dana and Ruth Maness relating to conversations with Linda Maness. No mention was made of Linda's letters. Petitioner did not assign error to these rulings on constitutional grounds. (A. 173).

When petitioner filed his brief in the

state appellate court, petitioner limited the pertinent issue, which he presented for review, to the exclusion of Dana Maness' testimony. His statement of material facts and his factual argument on the pertinent issue made only casual reference to the events which occurred during Linda's testimony, no mention of the letters allegedly written by Linda and no reference to the exclusion of Ruth Maness' testimony. Petitioner was conspicuously silent as to any claimed error regarding evidentiary rulings during Linda's testimony, was conspicuously silent as to any claimed error regarding the inability to use letters allegedly written by Linda, was conspicuously silent as to any claim of error regarding the exclusion of Ruth Maness' testimony and was conspicuously silent as to any assertion that these rulings collectively with the exclusion of Dana Maness' proffered testi-

mony had the effect of rendering petitioner's trial so fundamentally unfair as to constitute a miscarriage of justice of constitutional magnitude. (A. 175-178, 179, 182-183). Moreover, petitioner never sought to include the "bunch" of letters, which were referred to during Linda's testimony, in the state court appellate record, given that these letters were never marked for identification, never formally offered into evidence and never read into the record as part of a proffer. (A. 88-90; R. 1-447).

On May 30, 1972, the state appellate court rendered its decision in petitioner's case. This appellate opinion shows that that court predicated its decision on the pertinent issue solely on state evidentiary law, thereby giving clear indication that it was not addressing the pertinent issue as a constitutional question. (A. 186-187).

On February 21, 1973, this Court decided Chambers v. Mississippi, 410 U.S. 284 (1973). At no time following his solitary state appellate court decision did petitioner seek any form of state post-conviction relief in the Florida state courts. Petitioner alleged this inaction in his federal habeas corpus petition. (A. 190). Instead, petitioner went directly to federal court to obtain relief in light of Chambers and filed his petition on October 23, 1973.[4/] Petitioner asserted to the federal court that his claim was predicated upon (1) refusal of the state trial court to declare Linda an adverse and hostile witness; (2) refusal to permit petitioner to introduce inculpatory and impeaching letters written by

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[4/] The appendix submitted in this case inadvertently fails to include the filing date of the petition. (A. 188). However, this filing date is reflected in the federal court record on appeal which was submitted to this Court.

Linda; (3) exclusion of proffered testimony of Dana Maness and (4) exclusion of the proffered testimony of Ruth Maness. Petitioner claimed that all of the above collectively in the context of his entire trial rendered that trial a denial of due process of law. (A. 195-198).

Petitioner Maness further stated that he could not obtain post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850.[5/] No assertion was made that petitioner was precluded from resorting to every means of post-conviction relief available to him in the Florida state courts. Petitioner then claimed that he had exhausted the remedies available to him in the Florida state courts. (A. 203).

[5/] This means of post-conviction relief will be discussed subsequently.

Respondent Wainwright answered the petition by asserting inter alia that petitioner "has not exhausted his presently available state remedies and has prematurely sought the Writ." Respondent argued that petitioner by-passed use of Rule 3.850 and that, because Chambers was decided after his direct state court appeal, Rule 3.850 was available to vindicate expanding constitutional doctrines. Respondent further expressed his position that "the subsequent and intervening expression. . .in Chambers. . .renders petitioner's present claim so clearly distinct from the claim he has earlier presented to the state court that it may fairly be said that the state courts have had no opportunity to pass on the claim." (A. 207-209).

The federal district court rebuffed

Respondent Wainwright and ruled that Chambers did not establish new principles of constitutional law, that "in his direct appeal the petitioner presented the Florida Appellate Court with a fair opportunity to apply the constitutional principles discussed in Chambers to the facts and circumstances of petitioner's case", and that petitioner fully exhausted his state remedies. (A. 214-215). The federal district court then denied relief on the merits of petitioner's claim. (A. 218).

Respondent did not cross-appeal the federal court order but, following the Fifth Circuit's order granting rehearing en banc and directing the filing of supplemental briefs, respondent argued that the lower court's denial of relief should be affirmed for failure to exhaust available state remedies. The case terminated in

the Fifth Circuit without discussion on whether petitioner had exhausted available state remedies before seeking federal habeas corpus relief.

A. Petitioner Failed To Exhaust Available State Remedies Before Seeking Federal Habeas Corpus Relief.

1. The Florida state courts were never given a fair opportunity to address the same claim asserted by petitioner in the federal courts.

While at one time the federal habeas corpus doctrine of exhaustion of available state remedies was no more than a judicially created concept, Ex parte Hawk, 321 U.S. 114 (1944), federal courts are now required by legislative command to determine whether a state prisoner has exhausted available state remedies in every case before the power to grant relief is exercised.

Though this limitation on the exercise of the power is subject to narrowly crafted exceptions, such exceptions were never intended to be a loop-hole to denigrate federal-state comity. 28 U.S.C. § 2254; Pitchess v. Davis, 421 U.S. 482 (1975); Manning v. Alabama, 526 F.2d 355 (5th Cir. 1976). To satisfy the exhaustion requirement, the substance of the state prisoner's federal claim must be fairly presented to the state courts. It is not sufficient merely that the federal habeas corpus applicant has been through the state courts. Rather, the state courts must have the first opportunity to review the same claim he urges upon the federal courts. Pitchess v. Davis, 421 U.S. 482 (1975); Smith v. Goguen, 415 U.S. 566 (1974); Picard v. Connor, 404 U.S. 270 (1971). In Brown v. Allen, 344 U.S. 443, 447 (1953), this Court indicated that the phrase "same

claim" equates with the phrase "the same evidence and issues".

Where a petitioner bases his federal constitutional issue on relevant factual assertions never presented to the state courts and these factual allegations materially alter the nature of his claim or critically affect the determination of the issue so that the petitioner is in actuality presenting to the federal courts a materially different claim and stronger evidentiary case than that presented to the state courts, a petitioner cannot be said to have properly presented the state courts with a full and fair opportunity to rule on his claim and, therefore, has not satisfied the exhaustion requirement. Anderson v. Casscles, 531 F.2d 682 (2d Cir. 1976); Eaton v. Wyrick, 528 F.2d 477 (8th Cir. 1975); Gurule v. Turner, 461

F.2d 1083 (10th Cir. 1972); Daniels v. Nelson, 453 F.2d 340 (9th Cir. 1972); James v. Copinger, 428 F.2d 235 (4th Cir. 1970); United States ex rel. Figueroa v. McMann, 411 F.2d 915 (2d Cir. 1969); United States ex rel. Boodie v. Herald, 349 F.2d 372 (2d Cir. 1965) (vacating order denying claim on merits with instructions to dismiss without prejudice); Schiers v. California, 333 F.2d 173 (9th Cir. 1964); United States ex rel. Kessler v. Fay, 232 F.Supp. 139 (S.D.N.Y.1964); see United States ex rel. Cleveland v. Casscles, 479 F.2d 15 (2d Cir. 1973) (order granting relief vacated and remanded with instructions to dismiss without prejudice); United States ex rel. Rogers v. LaVallee, 463 F.2d 185 (2d Cir. 1972) (vacating order denying relief on merits with instructions to dismiss with-

out prejudice); Buffalo Chief v. South Dakota, 425 F.2d 271 (8th Cir. 1970); Milton v. Wainwright, 396 F.2d 214 (5th Cir. 1968); Wyatt v. Oklahoma, 385 F. Supp. 562 (W.D.Okla.1974); Clark v. Nickeson, 321 F.Supp. 415 (D.Conn.1971). A technical "paper" presentation of an issue to the state courts does not equate with a meaningful opportunity, both factually and legally, for the state courts to address the federal constitutional issue. Mobley v. Smith, 443 F.2d 846 (5th Cir. 1971). This has been recognized as a valid interpretation of the concept of exhaustion of state remedies by this Court in Picard v. Connor, 404 U.S. 270 (1971).

Did Petitioner Maness present the Florida state courts with a full and fair opportunity to rule on the same claim (i.e., same evidence and same legal issue)

which he presents to the federal courts? The only candid answer to this question is "No!" Such is true for several equally important reasons.

First, in the federal courts petitioner has centered the challenge to his conviction on the adverse evidentiary rulings occurring during Linda's testimony, buttressing them by rulings regarding the exclusion of the testimony of Dana and Ruth Maness. On direct appeal in the state courts petitioner relegated the rulings during Linda's testimony and that ruling involving Ruth Maness to nothingness by his own factual statement of the case and argument concerning the exclusion of Dana Maness' testimony. Petitioner told the Florida courts to look at his legal issue solely in terms of the ruling regarding Dana Maness. In fact, petitioner proce-

durally defaulted on any complaint regarding the rulings involving Linda and Ruth Maness. Although assigning error to these latter rulings, petitioner did not argue them in his brief. Florida has always taken the position that assignments of error not argued in a brief are deemed abandoned unless the appellate court sua sponte discovers a jurisdictional defect or fundamental error.[6/] Fla. App. Rule 3.7(i);

6/ This principle of appellate law serves a valid state interest by (1) assuring prompt litigation of issues that could necessitate retrial so that in such a case witnesses and physical evidence are available and memories do not fade; (2) avoiding imposing a time-consuming duty on an appellate court to partially--as opposed to impartially--review every criminal appellate record for every imaginable "Achilles' heel"; and (3) bringing finality to criminal litigation.

Petitioner cannot by-pass this procedural default by claiming that the Florida appellate court should have recognized this non-asserted claim as fundamental error because to do so is to admit that the issue

State v. Mayhew, 288 So. 2d 243 (Fla. 1973); Tracey v. State, 130 So. 2d 605 (Fla. 1961); Redditt v. State, 84 So. 2d 317 (Fla. 1955); North v. State, 159 Fla. 854, 32 So. 2d 915 (1947); Holland v. State, 39 Fla. 178, 22 So. 298 (1897); Wade v. State, 184 So. 2d 462 (Fla. 2d D.C.A. 1966). By abandoning these issues and minimizing their importance to his state appellate claim, the issue which was presented to the state appellate court came there in a totally different light.

Second, in this Court petitioner poses as his single most important fact a "bunch of letters" allegedly written by Linda Maness, which he equates with the confession of McDonald in Chambers. During

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he is presently asserting can still be raised in the state courts by collateral attack pursuant to Florida Rule of Criminal Procedure 3.850. Clark v. State, 336 So. 2d 468 (Fla. 2d D.C.A. 1976).

petitioner's trial his defense attorney only showed the trial judge two of a "bunch of letters"--only one of which was identified by date. Although at trial the defense attorney alleged that these letters contained matters beneficial to petitioner's case, the trial judge characterized these two letters as "a bunch of love letters to her husband from a girl who loves her husband, no matter what he has done. It says so." Petitioner's attorney did not mark these letters for identification or make these two letters a part of his record on appeal to allow the appellate court to read them so that the difference of opinion as to their contents could be resolved. (A. 88-90; R. 1-447). In Florida an appellant may not present alleged error for appellate consideration upon an incomplete record if the omitted

matter might affect the determination of the reviewing court. Constantino v. State, 224 So. 2d 341 (Fla. 3d D.C.A. 1969). Without these two letters before it, the state appellate court was not presented with facts which petitioner, himself, designates as facts which would critically affect the determination of the issue he has presented in federal court.[7/]

[7/] At his state trial petitioner made use of only two letters--one dated April 28, 1971, and one of an unspecified date. These two letters were to be used solely for impeachment. Petitioner never marked any letters for identification and never offered any letters into evidence as substantive evidence over and above their use for impeachment. (A. 88-90). Consequently, in any post-conviction proceeding petitioner is limited to at best supplementing the record of his state trial with the same two letters used at trial and, then, with the further limitation that they can only be used in the same manner and for the same use to review the same issue facing the state trial judge. Since petitioner had this "bunch of letters" of unknown quantity, content and authorship, at his trial, all of this "bunch" cannot be designated "newly discovered evidence."

The situation presented to this Court in the instant case is almost identical to that in Picard v. Connor, 404 U.S. 270 (1971). The only difference between Picard and this case is that in Picard the legal issue changed while here the material facts changed. Such is a distinction without a difference in assessing whether the state courts have been given a full and fair opportunity to litigate the same claim. Therefore, the result must be the same.

Respondent recognizes that the state courts have been denied a full and fair opportunity to litigate the same claim because of the procedural errors of petitioner's attorneys. However, petitioner cannot escape his predicament and avoid the exertion of any further effort to present his claim to the state courts because his attorneys put him in this position.

Such would make the State of Florida suffer for his errors. The onus of extricating himself from his dilemma lies with petitioner. Under these circumstances more than a mere assertion that he might not be able to again raise the same claim in the state courts should be required to entitle petitioner to have his instant claim reviewed by a federal petition for a writ of habeas corpus. See Francis v. Henderson, 425 U.S. 536 (1976).

2. Petitioner presently has at least one available state remedy to litigate the same claim which he has presented to the federal courts.

In federal district court petitioner asserted that he could not seek post-conviction relief in the Florida state courts because a proceeding pursuant to Florida Rule of Criminal Procedure 3.850 cannot be

used to litigate a point of law raised and decided on a direct appeal. Petitioner then claims that, as a consequence, he exhausted "the" remedies available to him. (A. 203). This assertion was incorrect.

Florida Rule of Criminal Procedure 3.850 was adopted from and is essentially verbatim to 28 U.S.C. § 2255. Case law interpretations of this federal statute are persuasive authority in interpreting Florida's rule. State v. Matera, 266 So. 2d 661 (Fla. 1972); State v. Weeks, 166 So. 2d 892 (Fla. 1964); Ray v. Wainwright, 151 So. 2d 825 (Fla. 1963); Dickens v. State, 165 So. 2d 811 (Fla. 2d D.C.A. 1964).[8/] As a general statement, Rule 3.850 is not a vehicle to raise grounds which could have or should have been presented on

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[8/] Rule 3.850 was adopted in 1963 and has previously been denominated Criminal Procedure Rule 1 and 1.850.

direct appeal and cannot be used as a substitute for a direct appeal. Fulford v. State, 311 So. 2d 203 (Fla. 3d D.C.A. 1975); Koedatich v. State, 287 So. 2d 738 (Fla. 3d D.C.A. 1974); Yanks v. State, 273 So. 2d 401 (Fla. 3d D.C.A. 1973); Spencer v. State, 259 So. 2d 512 (Fla. 3d D.C.A. 1972); Kish v. State, 253 So. 2d 889 (Fla. 3d D.C.A. 1971). While this interpretation of Rule 3.850 covers most trial errors, it does not preclude use of Rule 3.850 to present the state courts with the same claim which Petitioner Maness has asserted in the federal courts. Rule 3.850 was designed to consider claims on collateral attack that there has been such a denial or infringement of the constitutional rights of a prisoner so as to render the judgment vulnerable to collateral attack. Ratliff v. State, 256 So. 2d 262 (Fla. 1st D.C.A. 1972). The test which a particular claim

must pass to be one raised under Rule 3.850 is whether the alleged error is such as to have deprived the defendant of a fair trial when viewing the whole record. The mere assertion of a constitutional violation does not ipso facto satisfy this test. Reddick v. State, 190 So. 2d 340 (Fla. 2d D.C.A. 1966); Marti v. State, 163 So. 2d 506 (Fla. 3d D.C.A. 1964). Consequently, alleged errors which could have or should have been raised on direct appeal have been held cognizable under Rule 3.850. See, e.g., Cioli v. State, 303 So. 2d 82 (Fla. 4th D.C.A. 1974) (mental incompetency at trial); Burse v. State, 175 So. 2d 586 (Fla. 3d D.C.A. 1965) (prosecutorial comment on defendant's failure to testify); French v. State, 161 So. 2d 879 (Fla. 1st D.C.A. 1964) (denial of continuance which forced indigent defendant to trial without

allowing "last minute" court-appointed attorney a reasonable time to prepare defense). Where a claimed error of law is of such magnitude as to constitute a fundamental defect which renders a trial inherently a complete miscarriage of justice, that error can be raised on a collateral attack of a criminal judgment pursuant to Rule 3.850. Clark v. State, 336 So. 2d 468 (Fla. 2d D.C.A. 1976); see Davis v. United States, 417 U.S. 333, 346 (1973); Hill v. United States, 368 U.S. 424 (1962); Middlebrooks v. United States, 500 F.2d 1355 (5th Cir. 1974). Collateral attack is available in such circumstances because "fundamental" error renders the judgment void--not merely voidable. See McDaniel v. State, 219 So. 2d 421 (Fla. 1969); Cash v. Culver, 122 So. 2d 179 (Fla. 1960); cf. Potvin v. Keller, 313 So. 2d

703 (Fla. 1975); see also Fay v. Noia, 372 U.S. 391 (1963).

In the instant case, petitioner's federal court claim is of that quality which must be deemed an assertion of fundamental error. Petitioner asserts that he is entitled to a new trial not merely because evidentiary error was committed, but rather because that error in the context of his trial rendered his entire trial so fundamentally unfair as to constitute a miscarriage of justice. Consequently, under Florida law his present claim subjects his conviction to a Florida Rule of Criminal Procedure 3.850 collateral attack in spite of the fact that Petitioner Maness could have raised the same claim he is arguing in the federal courts during his direct appeal in the state courts.

It is true that the doctrine of res

judicata will preclude a criminal defendant from relitigating under Rule 3.850 an identical claim previously asserted in the appellate courts, where that claim was squarely presented, and actually decided, against the defendant. Lamberti v. Wainwright, 284 So. 2d 202 (Fla. 1973); State v. Biesendorfer, 244 So. 2d 147 (Fla. 4th D.C.A. 1971); Whitney v. State, 184 So. 2d 207 (Fla. 3d D.C.A. 1966); see Sanders v. United States, 373 U.S. 1 (1963); Boeckenhaupt v. United States, 537 F.2d 1182 (4th Cir. 1976).

Under Florida law, Petitioner Maness' attempt to avoid even an effort to return to the Florida courts by resort to the doctrine of res judicata must serve him for naught. A review of all the relevant facts concerning his state court appeal, as noted above, reveals that petitioner never raised his present claim in the state trial court,

never raised the same claim in the state appellate court and never had his constitutional claim actually decided by the state appellate court.

Assuming arguendo that Rule 3.850 is an inadequate or ineffective vehicle for asserting his present claim, petitioner can resort to a petition for a writ of habeas corpus in any Florida state court. Rule 3.850 has not superseded or abolished the common law writ of habeas corpus. Habeas corpus may still be utilized if it appears that a Rule 3.850 motion is inadequate or ineffective to test the legality of a defendant's detention. Art.I, § 13 and Art. V, Fla. Const.; Fla.R.Crim.P. 3.850; State v. Wooden, 246 So. 2d 755 (Fla. 1971); Hollingshead v. Wainwright, 194 So. 2d 577 (Fla. 1967); Evans v. State, 168 So. 2d 134 (Fla. 1964); Mitchell v. Wainwright, 155 So. 2d 868 (Fla. 1963); Tolar v. State,

196 So. 2d 1 (Fla. 4th D.C.A. 1967); McCormick v. State, 164 So. 2d 557 (Fla. 3d D.C.A. 1964); see United States v. Morgan, 346 U.S. 502 (1954); United States v. Hayman, 342 U.S. 205 (1952).

Assuming that neither of the above remedies is available to directly raise the exact claim in state court, petitioner can seek a belated appeal to raise the instant claim. It is apparent that he did not raise the same claim (same facts and same issue) on appeal in the state courts because of his attorney's actions.[9/]

[9/] Respondent assumes that petitioner did not participate in the decision of his court-appointed appellate attorney to raise a different claim in the state courts, to abandon issues regarding Linda and Ruth Maness and to present a different factual emphasis. Petitioner cannot argue otherwise, for if he did join in his attorney's actions, he is entitled to no federal habeas corpus relief. Murch v. Mottram, 409 U.S. 41 (1973).

Petitioner's state appellate attorney was court appointed. (A. 162). Failure of court-appointed appellate counsel to assert a patently arguable claim on direct appeal, which claim arguably "reeks with arguable merit," can entitle a criminal defendant to a belated appeal through a writ of habeas corpus on the ground of ineffective assistance of counsel. Ross v. State, 287 So. 2d 372 (Fla. 2d D.C.A. 1973).

In the federal district court, petitioner did no more than argue that one of several potentially available remedies was unavailable to him. The federal trial judge accepted this argument by assuming that no other state remedy was available. Such an assumption was improper. See Jennings v. Illinois, 342 U.S. 104 (1951). The federal statute, 28 U.S.C. § 2254, does not require that a particular state remedy be unavailable,

but that all remedies be presently available before a state prisoner can invoke the federal "Great Writ". Respondent submits that where doubt remains as to the present unavailability of a remedy, the petitioner must be required to exert some effort in the state courts to assuage that doubt. For the doctrine of exhaustion to be meaningful, the state courts--not the petitioner--must be given the benefit of the doubt. In the instant case Petitioner Maness had several available state remedies in order to present the state courts with the same claim which he desired to present in federal court.[10/] Petitioner did not

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10/ A decision that petitioner has not exhausted his available state remedies avoids the need to consider the federal constitutional issue he presents. If there is doubt whether Florida law provides a post-conviction remedy for petitioner under the circumstances of this case, this Court can and should certify

hide the fact that he did not even try to seek post-conviction relief. Rather Petitioner Maness recognized this doctrine only in the breach thereof. To consider petitioner's claim on the merits in this or any federal court bespeaks a low esteem for 28 U.S.C. § 2254 and the policy considerations upon which it is based.

B. Respondent Is Not Procedurally Barred From Affirming The Lower Courts' Denial Of Federal Habeas Corpus Relief On the Ground Of Failure To Exhaust Available State Remedies.

Respondent did not cross-appeal the judgment of the federal district court or cross-petition the judgment of the lower

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that question to the Supreme Court of Florida pursuant to Florida Appellate Rule 4.61, as it has done in the past. Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960); see Jennings v. Illinois, 342 U.S. 104 (1951).

appellate court. Such does not preclude respondent from urging affirmance of the district court's denial of relief on the ground of failure to exhaust available state remedies for the following reasons.

Issues in controversy below are available to a respondent as grounds for affirmance of a lower court order. United States v. Carignan, 342 U.S. 36, 38 n. 1 (1951); compare Tennessee v. Dunlap, ___ U.S. ___, 96 S.Ct. 2099, 2102 n. 3 (1976). Clearly, respondent contested the exhaustion issue both by his response in the federal district court and his supplemental brief filed in the lower appellate court.

If it appears in the record, the prevailing party may assert any ground in

support of a judgment without the need to cross-appeal or cross-petition, although his argument may involve an attack on the reasoning of the lower court or an insistence upon a matter overlooked or ignored by it. Massachusetts Mutual Life Ins. Co. v. Ludwig, ___ U.S. ___, 96 S.Ct. 2158 (1976); Fusari v. Steinberg, 419 U.S. 379, 387 n. 13 (1974); Dandridge v. Williams, 397 U.S. 471, 475 n. 6 (1970); United States v. Raines, 362 U.S. 17, 27 n. 7 (1960); Jaffke v. Dunham, 352 U.S. 280 (1957); United States v. Ballard, 322 U.S. 78 (1944); Langnes v. Green, 282 U.S. 531 (1931); United States v. American Railway Express Co., 265 U.S. 425 (1924); 9 Moore's Federal Practice § 204.11(3) (2d Ed). Respondent's exhaustion argument would result in affirmance of the lower courts' denial of relief to Petitioner Maness even

though the district court addressed the merits of petitioner's federal habeas corpus claim. See Milton v. Wainwright, 396 F.2d 214 (5th Cir. 1968). Consequently, failure to cross-appeal or cross-petition does not constitute a procedural bar to respondent's assertion in this Court of this important issue.

Respondent recognizes that there is an exception to the aforementioned rule. Where the losing party has nevertheless received some affirmative relief of substance from the judgment, an appellee-respondent must cross-appeal or cross-petition to enlarge his rights under the judgment or take away from the appellant-petitioner that matter of substance which the appellant-petitioner received below. Rondeau v. Mosinee Paper Corp., 422 U.S. 49, 61 n. 11 (1975); United States v.

Reliable Transfer Co., Inc., 421 U.S. 397, 401 n. 2 (1975); United States v. I.T.T. Continental Baking Co., 420 U.S. 223, 226 n. 2 (1975); Strunk v. United States, 412 U.S. 434 (1973); Swarb v. Lennox, 405 U.S. 191 (1972); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 381 n. 4 (1970); Nat'l. Labor Relations Bd. v. Express Pub. Co., 312 U.S. 426 (1941); Morley Const. Co. v. Maryland Casualty Co., 300 U.S. 185 (1937); see Brennan v. Arnheim & Neely, Inc., 410 U.S. 512 (1973). However, in the instant case respondent's argument that petitioner has failed to exhaust available state remedies does not enlarge respondent's rights under the district or appellate court judgments. Petitioner cannot assert that he received something of substance from the district court's erroneous determination that petitioner had exhausted available state remedies

in light of the fact that petitioner has consistently been denied relief on the merits of his present claim in both of the lower federal courts. Respondent submits that a "right" to proceed to lose on the merits is not that type of "right" which falls within the exception to the general rule, if such may be construed as a "right" at all.

Assuming arguendo that respondent should have cross-appealed or cross-petitioned, nevertheless respondent respectfully submits that this Court can and should address the instant exhaustion issue because of its quasi-jurisdictional nature. See Rose v. Dickson, 327 F.2d 27 (9th Cir. 1964); United States ex rel. Wissenfeld, 281 F.2d 707 (2d Cir. 1960); cf. Champagne v. Schlesinger, 506 F.2d 979 (7th Cir. 1974) (exhaustion of administrative remedies).

Scrutiny of whether a federal habeas corpus petitioner has exhausted available state remedies must be of concern at every level of the federal court system if the statutory command is to be effective.

POINT TWO

PETITIONER MANESS' STATE COURT TRIAL WAS NOT RENDERED FUNDAMENTALLY UNFAIR WHERE PETITIONER WAS PRECLUDED FROM UTILIZING VARIOUS ITEMS OF EVIDENCE BECAUSE OF NUMEROUS STATE EVIDENTIARY RULES OF LAW WHICH WARRANTED EXCLUSION OF SAID EVIDENCE UNDER THE CIRCUMSTANCES OF THIS CASE.

Petitioner Maness seeks to obtain a new trial in the Florida courts on the theory that his state court trial was fundamentally unfair because he was precluded from presenting various items of evidence to create a reasonable doubt of his guilt. Petitioner claims that this evidence would have been admitted but for an arbitrary application of Section 90.09, Florida Statutes (1971),

Florida's voucher rule. Petitioner asserts that his case is so similar factually to Chambers v. Mississippi, 410 U.S. 284 (1973) that he is entitled to a similar ruling in his favor.

Respondent Wainwright submits that a detailed analysis of what occurred at petitioner's trial will demonstrate that petitioner's position only superficially approaches the factual and legal circumstances which warranted the result in Chambers and that the instant case does not fall within Chambers' rationale. Rather, the record of petitioner's state court trial reveals that petitioner's excluded evidence was properly kept out because it failed to satisfy numerous principles of Florida evidentiary law. Moreover, any arguable error in excluding this evidence did not

reach the magnitude of rendering petitioner's trial fundamentally unfair so as to violate the Due Process Clause of the Constitution. Petitioner presents a case that is but a hollow shell of Chambers.

A. Petitioner's Case Does Not Fall Within The Rationale Of Chambers.

1. What Chambers means as precedent.

Chambers involved a situation in which a defendant was precluded from presenting evidence by an arbitrary application of legal rules under factual circumstances which showed that the trial court's evidentiary rulings were erroneously made. Chambers did not involve a situation where a defendant was precluded by state evidentiary law from presenting a "smokescreen" defense theory to the jury. Rather, Chambers involved a situation where the

defense was precluded from showing who the real culprit was. Defendant Chambers presented a great quantity of quality evidence to support this defense.

Prior to the erroneous evidentiary rulings, Defendant Chambers introduced evidence through two disinterested witnesses that another man, McDonald, had a gun in his hand and shot the victim. Defendant Chambers also managed to get a written confession of McDonald introduced into evidence and read to the jury. After this the State elicited a repudiation by McDonald of his confession. Then, the trial court precluded Chambers from impeaching McDonald's repudiation by holding that McDonald was not an adverse witness. Following this Chambers was precluded from introducing three independent oral confessions which McDonald made to three

disinterested witnesses within one day of the shooting. This evidence was excluded as hearsay.

This Court held that "in the circumstances of this case" the trial court made two erroneous evidentiary rulings which in conjunction deprived Chambers of a fair trial by precluding Chambers from presenting evidence from which the jury could judge for itself whether McDonald's testimony was worthy of belief.

However, in terms of precedent this Court expressly stated in Chambers that "In the exercise of [the right of a defendant to present witnesses in his own defense], the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment

of guilt and innocence." Chambers v. Mississippi, supra at 302. Moreover, this Court again clarified its ruling by stating, "Nor does our holding signal any diminuation in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." Chambers v. Mississippi, supra at 302-303. It is thus clear that Chambers does not hold that a trial judge is precluded from using state evidentiary law to preclude the admission of evidence which would support a defendant's defense in some way. Chambers did not hold that a state must throw away its rules of evidence when a defendant walks into the courtroom. See United States v. Morlang, 531 F.2d 183 (4th Cir. 1975); Truman v. Wainwright,

514 F.2d 150 (5th Cir. 1975); People v. Gant, 58 Ill.2d 178, 317 N.E.2d 564 (1974); People v. Taylor, 35 Ill.App.3d 756, 342 N.E.2d 436 (1976); State v. Connor, 241 N.W.2d 447 (Iowa 1976). For example, Chambers did not hold (1) that a defendant can impeach a witness on collateral matters, (2) that a defendant can impeach a witness without laying a predicate for impeachment by a prior inconsistent statement or (3) that a judge cannot apply a "voucher rule" where a party's own witness is not adverse. Nor, did Chambers hold that the mere fact that the exclusion of defense evidence interferes with a defense or renders a defense far less persuasive than it might have been renders a trial fundamentally unfair. Obviously, such is the inevitable effect of any evidentiary ruling on the party against whom an evidentiary principle is invoked.

2. The trial judge did not arbitrarily and erroneously preclude the petitioner from impeaching the testimony of Linda Maness by use of Section 90.09, Florida Statutes (1971).

Petitioner claims that Section 90.09, Florida Statutes (1971), Florida's voucher rule, precluded petitioner from impeaching Linda Maness. Petitioner further asserts that Linda was clearly an adverse witness so that this statute was misapplied in his case.[11/] A review of the state court transcript

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11/ Florida's voucher rule is statutory. Petitioner spends much effort inferring that this statute is unconstitutional and that numerous jurisdictions do not use a voucher rule as part of their rules of evidence. See, e.g., United States v. Torres, 477 F.2d 922 (9th Cir. 1973). Such an argument is irrelevant to the instant case.

Chambers expressly declined to hold voucher rules unconstitutional. Since the petitioner has never attacked the constitutionality of Section 90.09, Florida Statutes (1971), this Court will not sua sponte hold this statute unconstitutional.

brings into question the strength of petitioner's assertions.

Petitioner called Linda Maness as his first defense witness. Immediately petitioner's attorney sought to impeach Linda before Linda had given any testimony either for or against petitioner. These questions were sustained on the ground that they were leading. During her direct testimony, Linda repeatedly maintained that she did not know how the baby was injured and that she did not see petitioner do anything to the baby. (A. 86, 88, 95-96). When petitioner attempted to use a bunch of letters

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See Beck v. Washington, 369 U.S. 541 (1962). Moreover, this Court has expressly declined to federalize the various state rules of evidence under the guise of the Constitution. See Dutton v. Evans, 400 U.S. 74 (1970); cf. Lisemba v. California, 314 Y.S. 219 (1941). Consequently, Florida and every other state may promulgate its own rules of evidence independently of any other sovereign.

to impeach Linda, the trial court reviewed the only two letters given to it and ruled that these two letters were merely love letters, showed that Linda was not an adverse witness, and that at this moment in the trial there was nothing which Linda had testified to which was inconsistent with the contents of these two letters. The trial court ruled that petitioner had to follow the rules of evidence and that Linda had not yet testified to anything for which she could be impeached. As to a failure of Linda to state in a prior police statement that she was out of the house, the trial court in essence stated that this silence under the circumstances was not an inconsistency. (A. 88-92). Thus, the record reveals that the trial court was not using the voucher rule to preclude petitioner from impeaching Linda at this time.

In light of the above testimony during petitioner's direct examination and in light of the testimony during the State's case-in-chief, Linda cannot be said to be an adverse witness at the only time that petitioner asked the trial court to so rule. Moreover, the trial court's rulings demonstrate that the judge was applying numerous evidentiary rules other than the voucher rule in precluding the questions being asked. Consequently, the trial judge was not saying "no" to the petitioner's impeachment, but rather "not now", "not with this letter" and "not until a predicate for impeachment has been established."

To show that Linda was adverse, petitioner has to use testimony which did not come out until after the requested ruling, i.e., the State's cross-examination and petitioner's subsequent testimony. How-

ever, the correctness of an evidentiary ruling must be determined in light of the circumstances at the time the ruling was requested and not by hindsight. United States v. Samuel, 431 F.2d 610 (4th Cir. 1970). Following the rulings in question, petitioner never sought to recall Linda and/or to renew his request to treat Linda as an adverse witness. (A. 97-137). Furthermore, when petitioner conducted re-direct examination of Linda, the petitioner did in fact impeach Linda by a prior inconsistent statement given to the police following the crime and received an admission from Linda that she lied in that statement. (A. 99).[12/] While it can be

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12/ Florida law provides that a party may circumvent an adverse affect from the statutory voucher rule if that party proffers to the trial court that it cannot vouch for a witness' credibility. See, e.g., Tillman v. State, 44 So. 2d 644 (Fla. 1950);

argued that Linda was an adverse witness when petitioner attempted to admit Dana and Ruth Maness' testimony, petitioner did not renew his motion to treat Linda as adverse. Moreover, as will appear below, this testimony was properly excluded under other evidentiary rules of evidence.

> 3. Assuming arguendo that the trial court erroneously applied Florida's "voucher rule" to the instant case at anytime, petitioner's case does not fall within the rationale of Chambers because the evidence which petitioner sought to admit was inadmissible under numerous principles of evidentiary law.

This Court found error in Chambers because it found that the defendant's precluded evidence was in fact admissible.

Chapman v. State, 302 So. 2d 136 (Fla. 2d D.C.A. 1974). Petitioner never sought to utilize this evidentiary rule.

It is obvious that if the evidence which petitioner sought to use to develop his defense was inadmissible under other rules of evidence, petitioner suffered no harm from the voucher rule. If a trial court rules correctly but for the wrong reason, such will not warrant reversal where that ruling was correct for other reasons. See Brown v. Allen, 344 U.S. 443 (1953); J. E. Riley Inv. Co. v. Comm'r. of Internal Revenue, 311 U.S. 55 (1940); Helvering v. Gowan, 302 U.S. 238 (1937); State v. Clyde, 299 So. 2d 136 (Fla. 2d D.C.A. 1974); State v. Alvarez, 258 So. 2d 24 (Fla. 3d D.C.A. 1972); Harper v. State, 217 So. 2d 591 (Fla. 4th D.C.A. 1968).

Other courts have looked carefully at a "voucher rule" ruling to determine whether the evidence sought to be admitted for impeachment is in fact admissible for impeach-

ment; Chambers notwithstanding. United States v. Morlang, 531 F.2d 183 (4th Cir. 1975); Truman v. Wainwright, 514 F.2d 150 (5th Cir. 1975); Commonwealth v. Gee, 354 A.2d 875 (Pa. 1976).

a. The evidence which petitioner desired to use to impeach Linda was inadmissible under numerous rules of evidentiary law.

During Linda's direct testimony, petitioner attempted to impeach Linda by statements which Linda wrote in a bunch of letters to the effect that she was pregnant and that she "feels guilty about what she's done to the defendant." (A. 89). But, petitioner never asked Linda and Linda never testified inconsistently as to these matters. Petitioner withdrew the question of whether Linda told petitioner that she was pregnant on the day of the crime. (A. 92).

A witness cannot be impeached by a prior out-of-court statement unless there is in fact an inconsistency between what is testified to in court and the statement to be used for impeachment. Myers v. State, 43 Fla. 500, 31 So. 275 (1901); 3A Wigmore On Evidence § 1040 (Chadbourne rev. 1970); McCormick On Evidence § 34 (2d E.. 1972). Here, there was no inconsistent testimony at the time of the court's ruling regarding the letters.

Petitioner asked the court whether it could impeach Linda by the fact that she omitted stating that she was out of the house on the afternoon of the day of the crime; when she made a statement to the police following the baby's demise. The court ruled that although Linda already testified that she was out of the house there was no inconsistency, especially

since no one asked Linda about this matter at that time. (A. 90-92). [It should be noted that on the day of the crime both Linda and petitioner told the doctor at Jackson Memorial Hospital that Linda was out of the house during the afternoon in question, thereby precluding an argument that Linda's in-court testimony was a recent fabrication. (A. 41)]. Under the circumstances noted by the trial judge, Linda's silence in that statement was not an inconsistent "statement" to her in-court testimony. United States v. Hale, 422 U.S. 171 (1975).

The proffered testimony of Dana and Ruth Maness was likewise inadmissible for impeachment by a prior inconsistent statement. Dana's testimony allegedly would have been that Linda stated to Dana that

petitioner did not touch the baby, that she did not know what happened and that she never left her home to go to the store on the day in question. (A. 123). Ruth's proffered testimony was that Linda stated to her that the baby blankets became bloody because Linda had her period. (A. 124). This testimony was properly excluded as impeachment under the rule that before a witness can be impeached by a prior inconsistent statement, the witness must first be informed of the time, place and circumstances of the alleged statement and asked whether he or she made that statement. §90.09, Florida Statute (1971). Rowe v. State, 128 Fla. 394, 174 So. 820 (Fla. 1937); Seaboard Coast Line R.R. Co. v. Hunt, 299 So. 2d 84 (Fla. 1st D.C.A. 1974);

Urga v. State, 104 So. 2d 43 (Fla. 2d D.C.A. 1958); 3A Wigmore On Evidence §§ 1025-1039 (Chadbourne rev. 1970); McCormick On Evidence § 37 (2d Ed. 1972). Only if a witness first denies making the prior statement or fails to remember it can the making of that statement be proved by another witness. See Wingate v. New Deal Cab Co., 217 So. 2d 612 (Fla. 1st D.C.A. 1969). Here, petitioner never asked Linda about her alleged statements to Dana and Ruth Maness. (A. 84-97, 99-100). Furthermore, Ruth's proffered testimony was inadmissible because it was clearly an attempt to impeach Linda on a collateral matter. Patterson v. State, 157 Fla. 304, 25 So. 2d 713 (Fla. 1946); Herndon v. State, 73 Fla. 451, 74 So. 511 (Fla. 1917); see 3A Wigmore On Evidence §§ 1001-1003, 1020 (Chadbourne rev. 1970); McCormick On Evidence § 47 (2d Ed. 1972).

In light of the above law and facts the trial court properly precluded petitioner from impeaching Linda as he attempted to do.

b. The evidence which petitioner was precluded from using could not be admitted under a hearsay exception.

Under Florida law a prior inconsistent statement is not admissible as substantive evidence of the matters contained therein unless that statement is also admissible hearsay. Tomlinson v. Peninsular Naval Stores Co., 61 Fla. 453, 55 So. 548 (1911); Adams v. State, 34 Fla. 185, 15 So. 905 (1894); Thomas v. State, 289 So.2d 419 (Fla. 4th DCA 1972); Wallace v. Rashkow, 270 So.2d 743 (Fla. 3d DCA 1972); see 3A Wigmore on Evidence § 1018 (Chadbourne rev. 1970); McCormick On Evidence § 251 (2d ed. 1972).

Petitioner claims that the trial court precluded petitioner from introducing Linda's letters and that these letters in fact constituted a confession that Linda committed the crime. In contrast to petitioner's assertion in his brief, a review of the trial court transcript reveals that petitioner never sought to admit the letters as substantive evidence. Petitioner never marked these letters for identification, never formally offered them into evidence and never obtained a trial court ruling that these letters were inadmissible as substantive evidence. Petitioner only expressed a desire to admit these letters. (A. 88-92). Consequently, the state trial court record is devoid of an errorable ruling that these letters could not come in as substantive evidence of the matters contained therein. Respondent Wainwright

knows of no case in which reversal has resulted for failure to admit evidence that was never offered into evidence.[13]

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[13] Petitioner never presented the Florida appellate court or the lower federal district court with the bunch of letters which he contends were crucial to his defense. The Fifth Circuit record on appeal reveals that petitioner did not try to supplement the federal record on appeal with these letters until after the three judge opinion was rendered. The Fifth Circuit denied this motion. Petitioner presents this Court with these letters by way of the appendix to his petition for certiorari. These letters should not be considered other than insofar as the content of two letters appears in the state court transcript. Cuicci v. Illinois, 356 U.S. 571 (1958); United States ex rel. Stevenson v. Mancusi, 409 F.2d 801 (2d Cir. 1969).

Moreover, the state court record shows that only two letters were shown to the state trial court judge--only one of which was specified by date. Thus, there is no showing that the bunch of letters which petitioner attempts to present are the same letters which petitioner's attorney possessed on the day of petitioner's trial.

Finally, petitioner seeks to use these letters by arguing that sworn allegations as to the contents of the letters, which

The only evidence of the contents of these letters is a statement that Linda wrote that she was pregnant in her letter of April 28, 1971. (A. 88-89). Petitioner contends that this letter is admissible to show petitioner's state of mind in support of his testimony that he confessed because he did not want Linda to go to jail while carrying his baby. But, petitioner gave

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13 appeared in petitioner's habeas corpus petition, were not controverted by Respondent Wainwright. This statement creates a false impression. The habeas petition alleged no more concerning the contents of all of the letters than what appeared in the state court transcript. (A. 194-203). Moreover, respondent did not see these letters until after petitioner sought to supplement his Fifth Circuit record on appeal. Therefore, the respondent lacked both the need and the ability to controvert statements concerning letters exclusively in petitioner's possession.

his confession on April 26, 1971--two days before this letter was written. (A. 165). Consequently, the April 28, 1971 letter was irrelevant as support of petitioner's testimony. Petitioner could not have been influenced by a letter written two days after the event. Richert v. State, 338 So.2d 40 (Fla. 4th DCA 1976).

The proffered content of the unidentified letter to the effect that Linda "feels guilty about what she's done to the defendant" does not constitute a declaration against Linda's penal interest. Not only does this statement not assert that Linda did commit the crime but this statement also does not indicate that petitioner did not commit the crime. On this face, this statement would not in itself subject Linda to criminal liability. Linda's guilt feeling could easily be attributable to her

statements to the police which resulted in Gary's arrest. Moreover, this statement does not fulfill all of the requirements for admission of a declaration against Linda's penal interest. This letter was written weeks after the crime. There is no independent corroboration of Linda's guilt such as was found to exist in Chambers i.e. the written confession of McDonald and the testimony of two witnesses that McDonald had a gun and was seen shooting the decedant. Consequently, this letter was inadmissible hearsay. United States v. Barrett, 539 F. 2d 244 (1st Cir. 1976); United States v. Hughes, 529 F.2d 838 (5th Cir. 1976); United States v. Pena, 527 F.2d 1356 (5th Cir. 1976); United States v. Brandenfels, 522 F.2d 1259 (9th Cir. 1975); United States v. Wingate, 520 F.2d 309 (2d Cir. 1975); United States v. Harris, 501 F.2d 1 (9th Cir. 1974);

United States v. Goodlow, 500 F.2d 954 (8th Cir. 1974). Petitioner's position that this and other alleged declarations against Linda's penal interest become admissible because one cross-corroborates the other is fallacious logic. Such would allow a defendant to create admissible evidence by combining two items of inadmissible evidence.

The proffered testimony of Dana Maness that Linda told Dana, petitioner's relative, that petitioner did not touch the baby, that she did not know what happened and that she never left the house to go to the store on the day of the crime likewise is not a statement rendering Linda subject to criminal liability. These statements were allegedly made while Linda and petitioner were burying the baby prior to petitioner's arrest. For the same reasons stated above this statement

cannot come in as a declaration against penal interests.

The proffered testimony of Ruth Maness that Linda stated that the blankets were bloodied due to her period is at best irrelevant as hearsay evidence.

In light of the foregoing, the evidence which petitioner was precluded from using was properly kept out by numerous principles of Florida evidentiary law. Consequently, petitioner cannot claim harm from any ruling predicated on Florida's "voucher rule" statute. Thus, petitioner's case does not fall within the rationale of Chambers.

B. Assuming Arguendo That There Was Any Error In Excluding Any Or All Of The Items Of Evidence Which Petitioner Sought To Use, Such Error

Did Not Reach The Magnitude Of Rendering Petitioner's Trial Fundamentally Unfair Under The Circumstances Presented By The Entire Trial Court Record.

To constitute a denial of due process it is not enough that a trial court rendered an erroneous evidentiary ruling. Rather, by reason of this error petitioner's trial must be rendered fundamentally unfair under the totality of the facts in the case. Maggit v. Wyrick, 533 F.2d 383 (8th Cir. 1976)

Petitioner Maness testified that he was at the scene during the time of the crime and was so close to his residence that he was able to testify that Linda did not leave their residence to go to the store. Petitioner was therefore in a position to testify that he saw or heard Linda commit

the crime or that he knew Linda had to have committed the crime. But, nowhere during petitioner's testimony did petitioner affirmatively state that Linda committed the crime. (A. 100-122). In addition petitioner presented no independent evidence from other witnesses that Linda ever abused the baby. As a result he excluded evidence could serve no more than to create an inference on Linda's guilt and confuse the jury. In light of the aforementioned circumstances any error in the trial court's evidentiary rulings cannot rise to the level of rendering petitoner's trial fundamentally unfair. Greenfield v. Robinson, 413 F.Supp. 1113 (W.D. Vir. 1976).

C. Strong Policy Reasons Support Respondent's Position.

The very essence of Petitioner Maness'

argument is that a defendant must be given free rein to present any evidence which in some way would support his defense in total derrogation of evidentiary rules of law. He seeks to threaten the trial courts with the Constitution, thereby turning a shield into a sword. Petitioner thereby seeks to place the various governments of this country in the following position: The government cannot admit evidence obtained in violation of a defendant's constitutional rights no matter how truthful and telling that evidence is. Furthermore, the government must tow the line regarding evidentiary law and, if it faulters, the defendant may press for reversal. But, when a defendant seeks to present evidence, nothing can stop him. He can act free of constraint while the government must passively stand by. The specter of such a situation is chilling.

The Due Process Clause does not apply to the government. But, the government is also entitled to a fair trial and is entitled to insure that the truth will out. The only mechanism which the government has to attain this end is its ability to use the rules of evidence to exclude false testimony, preclude confusion of the issues, and prevent the freeing of the guilty. The battle for justice must be fair to both participants. Anything less destroys the integrity of the judicial system by distorting a judicial proceeding.

The Constitution does not guarantee defense anarchy in a courtroom. As Mr. Justice Cardozo explained in Snyder v. Massachusetts, 291 U.S. 97, 122 (1934):

> But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained to a filament. We are to keep the balance true.

For these reasons Petitioner Maness must not prevail.

D. Petitioner Maness Cannot Raise A Sixth Amendment Claim For The First Time In This Court.

The petition for a writ of habeas corpus which was filed in the lower federal court did not raise a claim that petitioner's Sixth Amendment rights were violated. Petitioner confined himself to an argument based on the Due Process Clause of the Fourteenth Amendment. (A. 188-203). Now, Petitioner Maness appends the Sixth Amendment to buttress his position. This he cannot do. Moore v. Illinois, 408 U.S. 786 (1972); Hill v. California, 401 U.S. 797 (1971).

CONCLUSION

This Court should affirm the decision of the lower courts which have denied relief to the petitioner for either of two reasons. First, petitioner failed to exhaust available state remedies before seeking federal habeas corpus relief, thereby vitiating the statutory command of 28 U.S.C. § 2254. Second, petitioner's attempt to fall within Chambers v. Mississippi, 410 U.S. 284 (1973) must fail because the rationale of Chambers does not apply to the factual circumstances of the instant case. The defense evidence excluded from petitioner's trial was properly excluded pursuant to numerous rules of evidence. Moreover, even if there was error in any particular evidentiary ruling, such did not render petitioner's trial fundamentally unfair under the circumstances of

his entire trial. Petitioner must not be allowed to utilize a "domino method of constitutional adjudication. . .wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation." Schneckloth v. Bustamonte, 412 U.S. 218, 246 (1973).

Respectfully submitted:

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